rate (BER) (channel quality)" as suggested by the Examiner on page 2 of the Office Action. The *Gitlin* reference does not use channel quality for the scheduling technique relied upon by the Examiner. Instead, the relied upon portion of the *Gitlin* reference is only concerned with using the different codes assigned to the users and scheduling the users so that there is not interference between the codes to keep the bit error rate at the acceptable threshold. Therefore, the Examiner's interpretation of the *Gitlin* reference is not consistent with the actual teachings of the reference and Applicant respectfully submits that it is an unreasonable interpretation.

Given that the *Gitlin* reference does not use channel quality for varying scheduling, even if the proposed combination of the *Gitlin* and *Hortensius* references could be made, there is no *prima facie* case of obviousness.

Further, the proposed combination of the *Gitlin* and *Hortensius* references cannot be made. The *Hortensius* reference describes a repetition rate selection having to do with repeated transmissions. That is not the same thing as a scheduling rate as used in the *Gitlin* reference, which is focused on scheduling users based upon whether they are a high bit-rate or low bit-rate user and so that their assigned codes do not interfere. Accordingly, the repetition rate of the *Hortensius* reference has nothing to do with the scheduling technique of the *Gitlin* reference. It follow that there would be no benefit or usefulness for the *Hortensius* repetition rate control technique in the context of the code-based scheduling technique of the *Gitlin* reference. Therefore, the proposed combination cannot be made because it does not provide a useful result. The *Hortensius* reference repetition rate does not in any way enhance the *Gitlin* code-based scheduling technique. Additionally, there would be no reason for a person of skill in the art to consider the repetition rate technique of *Hortensius* in the context of the code-based scheduling technique of the *Gitlin* reference.

The Examiner's proposed combination appears to be based on hindsight reasoning relying upon Applicant's claims to piece together unrelated portions of the references as stated in the Office Action. Hindsight reasoning is not a proper basis for attempting to establish a *prima facie* case of obviousness.

None of Applicant's claims can be considered obvious and this case is in condition for allowance.

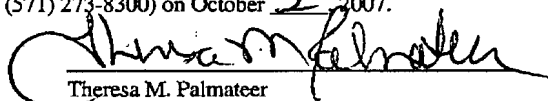Respectfully submitted,

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CERTIFICATE OF FACSIMILE

I hereby certify that this Response, relative to Application Serial No. 10/001/296 is being facsimile transmitted to the Patent and Trademark Office (Fax No. (571) 273-8300) on October 2, 2007.

Theresa M. Palmateer

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